IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.: 211 of 2006.

Reserved on: 18.06.2007.

Decided on: 24.08.2007.

State of H.P. and Another. … … Petitioners.

Versus

Shri Khirad Ram … … Respondent.

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting?[1] *Yes.*

For the Petitioners:	**Mr. M.S. Chandel, Advocate General with Mr. M.A. Khan and Ms. Meenakshi Sharma, Deputy Advocate Generals.**
For the Respondent:	**Mr. Rahul Mahajan, Advocate.**

Rajiv Sharma, Judge:

A challenge has been laid by the petitioners-State to the award passed by the Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala, dated 17.10.2005 in reference No.3/2002.

The State Government had made the following reference to the Labour Court-cum-Industrial Tribunal, Dharamshala:-

> **"Whether the retirement of Sh. Khird Ram workman S/o Sh. Neeru Ram on 31.5.2000 on the**

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[1] *Whether reporters of local papers may be allowed to see the judgment? Yes.*

basis of disputed Birth Certificate dated 3/06 Feb, 1995 issued by the Chief Medical Officer, Distt. Kangra, Dharamshala and not on the basis of Birth Certificate dated 29.4.1995 issued by the Medical Board, Distt. Kangra, H.P. Dharamshala, by the Executive Engineer, IPH Division, Palampur, Distt. Kangra, H.P. without complying the Section 25-N of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits including back wages, seniority and compensation the above workman is entitled to?"

In sequel to the reference made by the State Government, the respondent (hereinafter referred to as the workman for convenience sake) had filed his statement of claim. The employer-State had also filed its reply to the statement of claim.

The primary contention of the workman before the Labour Court was that he had been pre-maturely retired by the Assistant Engineer vide letter dated 31.5.2000 instead of 30.4.2010 on the basis of disputed birth certificate dated 3/6 February, 1995 reflecting his date of birth 24.5.1940 issued by the Additional Registrar (Death and Birth) Medical Officer, Kangra at Dharamshala and not on the basis of the birth certificate issued by the Chief Medical Officer (Medical Board), Kangra at Dharamshala whereby his age had been shown as 47 years vide letter dated 29.4.1995. The main contention of the employer before the Labour Court was that the workman himself had produced the birth certificate issued vide letter dated 3/6 February, 1995 at the time of his regularization and he was

estopped from challenging his date of birth at the fag end of his career. The Labour Court on the basis of the evidence led by the parties had answered the reference on 17.10.2005,

The learned Advocate General had strenuously argued that the workman had been retired on the basis of birth certificate produced by the workman, issued by the Additional Registrar (Death and Birth) Medical Officer, Kangra at Dharamshala and the birth certificate issued by the Chief Medical Officer (Medical Board) Kangra at Dharamshala had been wrongly relied upon by the Labour Court. Mr. Rahul Mahajan had supported the award dated 17.10.2005 and had contended that the Labour Court had rightly considered the birth certificate issued by the Medical Board, Kangra by ignoring the birth certificate issued by the Additional Registrar (Death and Birth), Medical Officer, Kangra at Dharamshala.

I have heard the learned counsel for the parties and gone through the record carefully.

The workman had completed 240 days in the block of 12 calendar months upto 31st December, 1993 and was regularized by the State with effect from 1.1.1994. He had submitted at the time of his regularization the birth certificate issued by the Additional Registrar (Death and Birth) Medical Officer (Health), District Kangra when he joined his duties on 7.2.1995. The birth certificate issued by the Additional Registrar (Death and Birth), Medical Officer (Health), District Kangra had shown his date of birth as 24.5.1940. He had appeared before the Medical Board

and the Medical Board had issued certificate dated 29.4.1995 to him showing his age as 47 years on that day. He had for the first time annexed this birth certificate issued by the Chief Medical Officer, Kangra on 29.4.1995 with his representation dated 9.6.1999 after about 5 years. As per para 7.1 of the Himachal Pradesh Financial Rules, Vol. I, the date of birth declared at the time of entry into Government service is conclusive unless an employee prays for correction of his age as recorded within two years. In the present case, the workman though in possession of the certificate dated 29.4.1995 had annexed the same with his representation in the year 1999. The case was rightly rejected by the State strictly as per para 7.1 of the Himachal Pradesh Financial Rules, Vol. I.

The workman had appeared as PW-1 and has testified that he was engaged as daily wager in the year 1974 and after putting in 22 years, he was regularized in the year 1994. He claimed that at the time of his regularization, he was only 48 years old. He had further stated that he was advised by the Assistant Engineer to appear before the Medical Board for ascertainment of his correct age and consequently, he appeared before the Medical Board which issued certificate Ext.P-2. He had categorically admitted in his cross-examination that at the time of his regularization his service book was prepared and his thumb impression was obtained in the service book and his date of birth was recorded as 24.5.1940. PW-2 Dr. C.S. Rathore had testified that certificate Ext.P-2 was issued from the office of Chief Medical

Officer, Kangra at Dharamshala. He had admitted that in the medical examination variation of 5 to 7 years in the case of elder people is possible. Dr. Rajinder Puri had appeared as PW-3 and he has produced the original of certificate mark-X which was exhibited as Ext.P-6, issued by the Additional Registrar (Death and Birth) Medical Officer of Health, Kangra at Dharamshala on the basis of birth register in respect of Police Station, Palampur for the period from 31.12.1937 to 12.12.1940.

Shri D.R. Gautam had appeared as RW-1 on behalf of the employer. He had testified that at the time of regularization, the workman had produced the birth certificate. In the certificate his date of birth was mentioned as 24.5.1940 and consequently the entries were made in his service book. RW-2 is Samarjeet Singh, Panchayat Secretary, Gram Panchayat, Dhanag.

The Labour Court had arrived at a finding which is contrary to the evidence led by the parties with regard to the date of birth of the workman. The workman had produced at the time of his regularization the birth certificate showing his date of birth as 24.5.1940. Consequently the entries were made in his service book. The presumption of truth is attached to the certificate issued by the Additional Registrar (Death and Birth), Medical Officer of Health, Kangra at Dharamshala. The version of the workman that it was procured by Shri Jagdish Chand, Store Keeper for him cannot be believed. The version of the workman that he was directed by the Assistant Engineer, I.P.H., Baijnath Sub Division to appear before the Medical Board on 29.4.1995 at

Dharamshala also cannot be believed. Why the Assistant Engineer will direct the workman to appear before the Medical Board when a birth certificate was already produced by him at the time of his regularization. The workman had for the first time annexed the copy of the birth certificate issued by the Medical Board with his representation made in the year 1999. The same has rightly been rejected by the State. If the workman knew that his date of birth has not been rightly recorded, he should have immediately taken recourse to the remedy as provided under the law instead of waiting for 5 years. The workman himself has admitted while appearing as PW-1 that he had submitted the certificate (Ext.P-1) and on that basis his service book was prepared and his thumb impression was obtained in the service book. Dr. C.S. Rathore (PW-2) had admitted that there can be variation of 5 to 7 years in age in case of elderly people. The Labour Court could not ignore Ext.P-1 by unduly relying upon the Ext.P-2. Ext.P-6 had been issued on the basis of birth register in respect of Police Station, Palampur for the period from 31.12.1937 to 12.12.1940. The Labour Court was unduly influenced b y the name ‘Brephtu alias Khird’ mentioned in the original register. It is an admitted fact that the name of the workman is Khirad and the same was reflected in the original register. The Labour Court also erred while arriving at the finding that the workman had brought to the notice of the Department the medical certificate, i.e. Ext.P-2. The Labour Court had also wrongly ignored Ext.RW-1/A which is the copy of the Pariwar

Register. The Labour Court had not correctly appreciated the statement made by Shri Samarjeet Singh.

The judgment cited by Mr. Rahul Mahajan ***Seema Ghosh and Tata Iron and Steel Company*** reported in ***2006 (III) FLR 492 SC*** is not applicable in the present facts and circumstances of this case. In Seema Ghosh's case the school leaving certificate which was produced by the workman was forwarded to the DEO, Dacca for verification who informed the Management that the certificate was not genuine and the workman was to superannuate in the year 1986, but on the basis of assessment of age made by the Medical Board, he was allowed to continue till 13.9.1987. It was in these circumstances that the workman was not permitted to assail the genuineness of the medical opinion on the basis of which his date of birth was altered. In the present case the Court has to consider the two certificates, one issued by the Additional Registrar (Death and Birth), Medical Officer of Health, Kangra at Dharamshala whereby the date of birth has been shown of the workman to be 24.5.1940 and the certificate Ext.P-2 issued by the Chief Medical Officer (Medical Board), Kangra whereby the age of the workman was shown 47 years as on 29.4.1995. The judgment cited by Mr. Rahul Mahajan is also distinguishable on the ground that in the present case the workman himself had produced the birth certificate issued by the competent authority in the year 1995 and thereafter had produced Ext.P-2, the birth certificate issued by the Medical Board in the year 1999. The same has been rejected by the

State as per para 7.1 of the Himachal Pradesh Financial Rules, Vol. I.

Their Lordships of the Hon'ble Supreme Court have held in the following cases that the date of birth is to be got corrected within a reasonable period from joining the service and the practice of seeking correction of date of birth at the fag end of career is deprecated.

The Hon'ble Supreme Court has held in the following cases that the principle of estoppel will also apply against the employee who seeks the change in his date of birth after declaring his date of birth at the time of recruitment/appointment. The Hon'ble Supreme Court has held in ***Union of India versus C.Rama Swamy and Others, (1997) 4 SCC 647*** as under:-

> **"In matters relating to appointment to service various factors are taken into consideration before making a selection or an appointment. One of the relevant circumstances is the age of the person who is sought to be appointed. It may not be possible to conclusively prove that an advantage had been gained by representing a date of birth which is different than that which is later sought to be incorporated. But it will not be unreasonable to presume that when a candidate, at the first instance, communicates a particular date of birth there is obviously his intention that his age calculated on the basis of that date of birth should be taken into consideration by the appointing authority for adjudging his suitability for a responsible office. In fact, where maturity is a relevant factor to assess suitability, an older**

person is ordinarily considered to be more mature and, therefore, more suitable. In such a case, it cannot be said that advantage is not obtained by a person because of an earlier date of birth, if he subsequently claims to be younger in age, after taking that advantage. In such a situation, it would be against public policy to permit such a change to enable longer benefit to the person concerned. This being so, we find it difficult to accept the broad proposition that the principle of estoppel would not apply in such a case where the age of a person who is sought to be appointed may be a relevant consideration to assess his suitability.

In such a case, even in the absence of a statutory rule like Rule 16-A, the principle of estoppel would apply and the authorities concerned would be justified in declining to alter the date of birth. If such a decision is challenged the court also ought not to grant any relief even if it is shown that the date of birth, as originally recorded, was incorrect because the candidate concerned had represented a different date of birth to be taken into consideration obviously with a view that that would be to his advantage. Once having secured entry into the service, possibly in preference to other candidates, then the principle of estoppel would clearly be applicable and relief of change of date of birth can be legitimately denied. To that extent the decision in *Manak Chand case* does not lay down the correct law."

The Hon'ble Supreme Court has held in ***G.M. Bharat Coking Coal Ltd., West Bengal versus Shib Kumar Dushad and Others, (2000) 8 SCC 696*** that where the date of birth as entered in service record is questioned before court by an employee shortly before his retirement, burden lies heavily on him to establish his stand by producing acceptable evidence of clinching nature. Their Lordships have held as under:-

> **"The date of birth of an employee is not only important for the employee but for the employer also. On the length of service put in by the employee depends quantum of retiral benefits he would be entitled to. Therefore, while determining the dispute in such matters courts should bear in mind that a change of the date of birth long after joining service, particularly when the employee is due to retire shortly, will upset the date recorded in the service records maintained in due course of administration should not generally be accepted. In such a case the burden is heavy on the employee who comes to the court with the case that the date of birth in the service record maintained by the employer is untrue and incorrect. The burden can be discharged only by producing acceptable evidence of a clinching nature. We are constrained to make this observation as we find that in a large number of cases employees who are on the verge of retirement raise a dispute regarding correctness of the date of birth entered in the service record and the courts are inclined to pass an interim order for continuance of such employee beyond the date of superannuation on the basis of the entry of date of birth in the**

service record. Such a situation cannot be commended for the reason that the court in passing such an interim order grants a relief to the employee even before determining the issue regarding correctness of the date of birth entered in the service record. Such interim orders create various complications. Anticipated vacancy for which the employee next in the line has been waiting does not materialise, on account of which the junior is denied promotion which he has all along been led to believe will be his due on the retirement of the senior."

Their Lordships of the Hon'ble Supreme Court have held in ***State of Punjab and Others versus S.C. Chadha, (2004) 3 SCC 394*** that unless a clear case on the basis of clinching materials, which can be held to be conclusive in nature, is made by the employee and that too within a reasonable time as provided in the rules governing the service, the court or the tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Their Lordships have held as under:-

"An application for correction of the date of birth should not be dealt with by the courts, tribunal or the High Court keeping in view only the public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years below him for their respective promotions are affected in this process. Some are likely to suffer irreparable

injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose the promotion forever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate senior. This is certainly an important and relevant aspect, which cannot be lost sight of by the court or the tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case on the basis of clinching materials which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the court or the tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Before any such direction is issued or declaration made, the court or the tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be within at least a reasonable time. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the

applicant, to prove about the wrong recording of his date of birth, in his service-book. In many cases it is a part of the strategy on the part of such public servants to approach the court or the tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their date of birth in the service-books. By this process, it has come to the notice of this Court that in many cases, even if ultimately their applications are dismissed, by virtue of interim orders, they continue for months, after the date of superannuation. The court or the tribunal must, therefore, be slow in granting an interim relief or (sic of) continuation in service, unless prima facie evidence of unimpeachable character is produced because if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed undeserved benefit of extended service and thereby caused injustice to his immediate junior."

The Hon'ble Supreme Court has held in ***State of U.P. and Another versus Shiv Narain Upadhyaya, (2005) 6 SCC 49*** that date of birth recorded in service book should be decisive. Their Lordships have held as under:-

"Normally, in public service, with entering into the service, even the date of exit, which is said as the date of superannuation or retirement, is also fixed. That is why the date of birth is recorded in the relevant register or service book, relating to the individual concerned. This is the practice prevalent in all services, because every service has fixed the age of retirement, and it is necessary to maintain the date of birth in the

service records. But, of late a trend can be noticed, that many public savants, on the eve of their retirement waking up from their supine slumber raise a dispute about their service records, by either invoking the jurisdiction of the High Court under Article 226 of the Constitution or by filing applications before the Administrative Tribunals concerned, or even filing suits for adjudication as to whether the date of birth recorded is correct or not.

Most of the States have framed statutory rules or in absence thereof issued administrative instructions as to how a claim made by a public servant in respect of correction of his date of birth in the service record is to be dealt with and what procedure is to be followed. In many such rules a period has been prescribed within which if any public servant makes any grievance in respect of error in the recording of his date of birth, the application for that purpose can be entertained. The sole object of such rules being that any such claim regarding correction of the date of birth should not be made or entertained after decades, especially on the even of superannuation of such public servant. In the case of *State of Assam v. Daksha Prasad Deka* this Court said (at SCC pp. 625-26, para 4) that the date of the compulsory retirement

> **"must in our judgment, be determined on the basis of the service record and not on what the respondent claimed to be his date of birth, unless the service record is first corrected consistently with the appropriate procedure".**

In the case of *Govt. of A.P. v. M. Hayagreev Sarma* the A.P. Public Employment (Recording and Alteration of Date of Birth) Rules, 1984 were considered. The public servant concerned had claimed correction of his date of birth with reference to the births and deaths register maintained under the Births, Deaths and Marriages Registration Act, 1886. The Andhra Pradesh Administrative Tribunal corrected the date of birth as claimed by the petitioner before the Tribunal, in view of the entry in the births and deaths register ignoring the Rules framed by the State Government referred to above. It was, inter alia, observed by this Court: (SCC p. 685, para 7)

> **"7. The object underlying Rule 4 is to avoid repeated applications by a government employee for the correction of his date of birth and with that end in view it provides that a government servant whose date of birth may have been recorded in the service register in accordance with the rules applicable to him and if that entry had become final under the rules prior to the commencement of 1984 Rules, he will not be entitled for alteration of his date of birth."**

Similarly, the Hon'ble Supreme Court has held in ***U.P. Madhyamik Shiksha Parishad and Others versus Raj Kumar Agnihotri, (2005) 11 SCC 465*** that the date of birth recorded in service book at the time of entry in Government service shall be

deemed to be correct date of birth. Their Lordships have held as under:-

> **"The amended rule of 1980 was deemed to have come into force w.e.f. 28-5-1974 and as per the substituted rule, the date of birth or the age recorded in the service-book at the time of entry into the government service shall be deemed to be the correct date of birth or age, as the case may be, for all purposes and that no application or representation shall be entertained for correction of date of birth or age in any circumstances whatsoever. The respondent has given his date of birth as 30-7-1941 at the time of entry into service which has also been recorded in the service records of the respondent. The above amended rule which came into force w.e.f. 7-6-1980 stipulates that no application or representation shall be entertained for correction of such date or age in any circumstances whatsoever and that the date of birth or age recorded in the service-book at the time of his entry into government service shall be deemed to be his correct date of birth or age as the case may be for all purposes."**

Their Lordships have held in ***State of Gujarat and Others versus Vali Mohd. Dosabhai Sindhi, (2006) 6 SCC 537*** that request made for alteration/correction of date of birth entered in service record at the verge of retirement cannot be entertained. Their Lordships have held as under:-

> **"An application for correction of the date of birth should not be dealt with by the courts, the Tribunal or High Court keeping in view only the**

public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose the promotion for ever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate senior. This is certainly an important and relevant aspect, which cannot be lost sight of by the court or the tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case on the basis of materials which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the court or the tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Before any such direction is issued or declaration made, the court or the tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made,

prescribing the period within which such application has to be filed, then such application must be within at least a reasonable time. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant to prove about the wrong recording of his date of birth in his service book. In many cases it is a part of the strategy on the part of such public servants to approach the court or the tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their dates of birth in the service books. By this process, it has come to the notice of this Court that in many cases, even if ultimately their applications are dismissed, by virtue of interim orders, they continue for months, after the date of superannuation. The court or the tribunal must, therefore, be slow in granting an interim relief or continuation in service, unless prima facie evidence of unimpeachable character is produced because if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed undeserved benefit of extended service and thereby caused injustice to his immediate junior."

The award passed by the Labour Court, dated 17.10.2005 is perverse and against the facts and records, thus, liable to be interferred with under Article 226 of the Constitution of India.

Consequently, this writ petition is allowed. The award dated 17.10.2005 is quashed and set aside. No order as to costs.

(Rajiv Sharma) Judge.

August 24, 2007.
(sck)